

1 David L. Rose (DCB 376379)  
Daver@Roselawyers.com  
2 Joshua N. Rose (DCB 420606) *Pro Hac Vice Application Pending*  
Josh@Roselawyers.com  
3 Earlene W. Rosenberg (DCB 974273) *Pro Hac Vice Application Pending*  
Erosenberg@roselawyers.com  
4 **ROSE & ROSE, P.C.**  
1320 19<sup>th</sup> Street, N.W., Suite 601  
5 Washington, D.C. 20036  
Telephone: (202) 331-8555  
6 Facsimile: (202) 331-0996

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11       FRED HULAC and 95 other )  
12       Plaintiffs on their behalf )  
13       and on behalf of others )  
14       others similarly situated )  
15                                  )  
16                                  )      **CASE NO. 08-01557 JSW**  
17                                  )  
18                                  )      **PLAINTIFFS OPPOSITION TO**  
19                                  )      **DEFENDANT'S MOTION TO TRANSFER**  
vs.                                 )  
                                    )      **VENUE to the Central District**  
                                   )  
                                   )      **Oral Argument July 11, 2008**  
                                   )  
FEDERAL EXPRESS CORPORATION, )      **Collective Action under the ADEA**  
                                   )  
                                   )      **Class Action under the FEHA**  
Defendant.                     )      **Class Action under ERISA**  
                                   )

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO  
TRANSFER VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA**

## INTRODUCTION

Defendant “FedEx” asks this Court to transfer this case from this District to the Central District of California, although it does not assert that this Court is an “inconvenient” forum. Venue in this District is proper because Defendant FedEx does business in this District and because at least five of the Plaintiffs were employed by FedEx and were harmed in this District. Fed Ex’s motion to transfer should be denied. 28 U. S. C. 1391(c); 29 U.S.C. 1132(e); and

1      *Passaantino v. Johnson & Johnson*, 212 F.3d 493, 504 (9<sup>th</sup> Cir. 2005).

2

3

## FACTS

4      The ninety-six Plaintiffs in the Amended Complaint are from more than 20 different  
5 states. They allege that Federal Express follows age discriminatory practices in violation of the  
6 Age Discrimination in Employment Act (ADEA) and harms its older workers by denying them  
7 the opportunity to obtain a full retirement in violation of Employee Retirement Income and  
8 Security Act (ERISA), 29 U. S. C. 1132 and 1140. They bring their suit against FedEx under the  
9 ADEA as a collective action under that provision of Federal law. They bring an ERISA class  
10 action. Collective actions are encouraged under the ADEA, because the Congress intended to  
11 give employees and former employees the right to bring a collective action, not only to reduce  
12 the costs for each plaintiff but also in the interests of judicial economy, by having many claims  
13 resolved in one proceeding on liability. *Hoffman La Roche v. Spaulding*, 493 U. S. 165, (1989).

14      Defendant Federal Express Corp. (“FedEx”) “is a Delaware Corporation with its principal  
15 place of business in Tennessee” and “its witnesses are primarily located in Memphis, Tennessee  
16 as well as various relevant computerized corporate records” Defendant’s Mo. to Transfer Venue  
17 at page 3. However, it has a Bay Area District Office in San Mateo County and 25 stations within  
18 this judicial District.<sup>1</sup>

19      Insofar as it seeks a change of venue, the only convenience factor asserted by FedEx is  
20 that its “counsel has offices in Memphis and Irvine California.” FedEx also appears to rely upon  
21 the fact that Rose & Rose, PC represented couriers Clausnitzer, Contreras, Kubicki, Martinez,  
22 and Mitchell in *Clausnitzer, et al v. Federal Express Corp.*, No. SAC 05-CV-1269 (Anx). See  
23 Motion to Transfer Venue at 2-3.

24      Defendant FedEx does not assert that venue in this forum is improper or inconvenient for

25

26

27

---

<sup>1</sup> Information on the number of stations was derived from data FedEx produced in discovery FedEx 3/2/2007 and 28 U.S.C. 84.

28

1 it. As a Corporation that does business in this District, Defendant FedEx "is deemed to reside in  
 2 any judicial district in which it is subject to personal jurisdiction." 29 U. S. C. 1391(c).

3 Defendant's 25 stations in this jurisdictional District are places where the Defendant  
 4 employs couriers, ramp transport drivers and other hourly personnel and managers, who pick up  
 5 and deliver packages throughout the area assigned by FedEx to that station. Am. Complaint  
 6 paras. 21, 22, 23, 24, 25, 26, 27, 29, and 30.

7 Venue in this District is "proper" venue and Defendant apparently so concedes, because it  
 8 has not filed a motion to dismiss for improper venue. See Rule 12(b)(3). Federal Express  
 9 Corporation accepted service of the Complaint, without allegation that the venue was improper.

10 Defendant's motion is without merit. Plaintiffs Hulac, Edwards, Fingerson, Gray and  
 11 Stewart have been employed by Defendant at stations in the Bay Area who have suffered harm in  
 12 this District, they assert, because of the Defendant's age discriminatory conduct here. See,  
 13 Amended Complaint at para. 102-108.

14

15

## ARGUMENT

16 1. Plaintiff Chose This District and Defendant Has Shown No Inconvenience Warranting  
 17 Transfer.

18 As the courts have recognized, "...great weight is generally accorded to the plaintiff's  
 19 choice of forum." *Lou v. Belzberg*, 834 F.2d 730, 739 (9<sup>th</sup> Cir. 1987), unless the defendant makes  
 20 a showing that the "operative facts have not occurred with the forum and the forum has no  
 21 interest in the parties or the subject matter" for at least five couriers the operative facts occurred  
 22 here and this forum has an interest in the parties and the subject matter. *Lou v. Belzberg, supra*,  
 23 834 F.2d at 740.

24 "The defendant must make a strong showing of inconvenience in order to warrant  
 25 upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805  
 26 F.2d 834, 843 (9<sup>th</sup> Cir. 1986); *Tribal Fusion, Inc. v. Click Here, Inc.*, 2005 WL2008022 (N.D.

27

28

1 Cal. 2005); *Tamashira v. Harvey*, 487 F. Supp. 2d 1162, 1165 (D. Hawaii 2006).

2 Defendant states: "Given that FedEx is not incorporated in, nor a resident of  
 3 California...it is more convenient and would further the interest to have the case venued in the  
 4 Central District..." Defendant's Motion to Transfer Venue, page 3. No authority is cited for that  
 5 statement by the Defendant. It falls far short of the showing of inconvenience required to justify  
 6 transfer.

7 Defendant's unsupported assertion is erroneous. For if a corporation does business in this  
 8 District and it has offices or stations where it carried out contracts in this District, it is treated as a  
 9 resident of the California for purposes of venue. 28 U. S. C. 1391(c), *Myers v. Bennett Law  
 Offices*, 238 F. 3d 1068, 1075 (9<sup>th</sup> Cir. 2001)(quoting from that provision of Title 28). "A  
 10 corporation may be sued in any judicial district in which it is licensed to do business or is doing  
 11 business, and such judicial district shall be regarded as the residence of such corporation for  
 12 venue purposes." Congress has authorized suit in this District under 28 U.S.C. 1391 (c).

14 Defendant Fed Ex concedes that the Central District is no more convenient to it than this  
 15 District. It states: "the convenience of the parties and witness will not be affected by a transfer  
 16 from the Northern District to the Central District." Memo. of Defendant Federal Express Corp. at  
 17 9 and 10.

18 Congress has provided alternate forums "to afford citizens full and easy redress of civil  
 19 rights grievances." *Passaantino v. Johnson & Johnson*, 212 F.3d 493, 504 (9<sup>th</sup> Cir. 2000);  
 20 *Richardson v. Alabama State Board of Education*, 935 F.2d 1240, 1248 (11<sup>th</sup> Cir. 1991).

21 In addition district courts "have supplemental jurisdiction over all other claims that are so  
 22 related to the claims in the action ...that they form part of the same case or controversy under  
 23 Article III of the United States Constitution." 28 U. S. C. 1337(a). The claims under Count Two  
 24 of the Amended Complaint for violations of the law of California are such supplemental claims.

25 The Defendant's motion and memorandum also ignore the pension claims brought by the  
 26 Plaintiffs under the ERISA in this case. Those claims under ERISA were not asserted by the

1 Plaintiffs in the *Clausnitzer* case, *supra*, or in *Holowcki et al. v. Federal Express Corporation*,  
2 \_\_\_\_ U. S. \_\_\_, 128 S. Ct. 11247, now pending on remand in the District Court for the Southern  
3 District of New York, No. 02-cv-03355 JSR. Insofar as the Defendant asserts that the claims in  
4 the Amended Complaint are the same as asserted in *Clausnitzer*, Defendant errs.

5 Under ERISA, suit may be brought in any district court where “a Defendant resides or  
6 may be found.” 29 U. S. C. 1132(e)(2), see also Sec. 502(e)(2), 29 U. S. C. 1132(e)(2); *Varsic v.*  
7 *District Court for the Central District of California*, 607 F. 2d 245, 248249 (1979). FedEx  
8 resides here and was found here, so this Court may hear and decide the claims of the Plaintiffs  
9 under ERISA, as well as those under the ADEA and under the California FEHA.

10 Under the 28 U.S.C. 1391(c), and 29 U.S.C. 1132, the Plaintiffs have the right to select  
11 the forum “independently of the wishes of the defendant.” *Hoffman, et al v. Blaski, et al*, 363 U.  
12 S. 335 (1960). “If when a suit is commenced, plaintiff has a right to sue in the district court,  
13 independently of the wishes of the defendant, it is a district ‘where (the action) may have been  
14 brought.’ If he does not have that right, independently of the wishes of defendant, its is not a  
15 district ‘where it might have been filed.’” *Hoffman, et al v. Blaski*, 363 U.S. 3335, 343-44 (1960).

16 Defendant’s motion is based upon the erroneous assumption that the ADEA does not  
17 authorize this Court to rule on the claims of the ninety-six Plaintiffs in this case to select this  
18 Court as the forum for resolution of their claims under the ADEA, with ERISA without the  
19 concurrence of the Defendant.

20 Defendant Fed Ex argues that “under 28 U. S. C. 1404(a), courts must balance the  
21 plaintiffs choice of forum against the burden of litigating in an inconvenient forum.” Argument  
22 of Defendant at 5.

23 However, there is no need to weigh the considerations for or against this forum, because  
24 Plaintiff had the right under the ADEA 29 U.S.C. 626 and ERISA and under 28 U. S. C. 1391(c)  
25 to chose a forum where Defendant does business, and to do so without considering the wishes of  
26 the Defendant. *Hoffman v. Blaski, supra*, 363 U. S. at 344. Accord: *Varsic v. District Court for*  
27

*the Central District of California, supra*, 607 F.2d at 248-249.

FedEx has readily available attorneys located in California who have represented FedEx in litigation with this District in large class proceedings and other cases involving only one plaintiff or a few plaintiffs. FedEx also has attorneys from headquarters in Memphis represent it in this District. FedEx established an office for attorneys in Irving, California a few years ago near the Central District.

Below are at least seven cases against FedEx in this District and the five attorneys who represented FedEx:

1. Christopher Yost, a FedEx employee, represented FedEx in cases:  
*Anderson v. FedEx*, 08-01441 (SI), *Evans v. FedEx*, 08-01005 (EDL);  
*Tucker v. FedEx*, 07-04480 (MHP); *Satchell v. FedEx*, see paragraph below
  2. David Sidney Wilson III, a FedEx employee, represented FedEx in:  
*Collins v. FedEx*, 07-0132 (JW) and
  3. Frederick Douglas, a FedEx employee who represented FedEx in *Satchell v. FedEx*, see paragraph below,
  4. Francis J Ortman III,
  5. Gilmore Diekmann, Jr. and
  6. Patricia H. Cullison represented FedEx in:  
*Evans v. FedEx, et al*, 07-05484 (BZ).
  7. Barak Babcock, 8. George Riley, 9. Sandra Colene Isom, Jr, 10. Cynthia Collins, 11. David Billions, 12. Craig C. Conley, 13. Jay Grytdahl, 14. Jeana M. Literll, 15. Kathy L. Laizure, 16. Richard McConnell, 17. T. Robert Reid and 18. Terrence O'Neal Reed are attorneys employed by FedEx who represented FedEx in the Northern District of California in the following two cases:  
*Satchell v. FedEx*. C03-2659 (SI); C03-2878 (SI) (class action settled on August 14, 2007)

Attorneys at law Gilmore Deikman, Francis Ortman, Patricia Cullison, Kimili Dawson, Tom Jerman and David Reis are attorneys in San Francisco are not employed by FedEx but they have represented FedEx in cases in this District.

Several of the above listed attorneys have represented FedEx in more than one matter before the Northern District of California. Plaintiffs counsel and witnesses can easily travel to this Court. Lead lawyer Efkeman can travel to this Court from Memphis, Tennessee as

1 economically and quickly as to the Central District.

2 FedEx appears to argue it is more convenient for them to litigate in the Central District of  
 3 California because they have a law office in Irvine, California. It would be an error to give  
 4 weight to the location of counsel, rather than witnesses. *In re Horseshoe Entertainment*, 337 F.3d  
 5 429 (5<sup>th</sup> Cir. 2003) *cert denied sub nom. Rogers v. Horseshoe Entertainment*, 540 U.S. 1049  
 6 (2003). The Fifth Circuit held that the lower court erred in relying on the "irrelevant and  
 7 improper" factor of the location of counsel. *Id.* at 434.

8 2. Venue with this District is Proper because Defendant Does Business in this District and at  
 9 Least Five Plaintiffs Resided and Were Employed by the Defendant in This District.

10 Plaintiff Hulac was employed at STSA (CA) District in Santa Rosa, as were Plaintiffs  
 11 Stewart and Gray. Plaintiff Kathy Fingerson was employed at the NOTA(CA) Station in  
 12 Petaluma and Plaintiff Edwards was employed by FedEx at its SRU station in Santa Cruz. Each  
 13 of these Plaintiffs worked in this District and resided in this District and were harmed by the age  
 14 discriminatory conduct of Defendant and the alleged termination of their employment or  
 15 reduction in retirement benefits. In addition Plaintiff David Williams was employed by FedEx in  
 16 San Joaquin County. Plaintiffs Fred Hulac and Kathy Fingarson filed class charges with the  
 17 EEOC of under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 et seq.,  
 18 and the FEHA, Cal. Gov't. Code § 12940.

19 The five Plaintiffs in *Clausnitzer, et al v. Federal Express Corp.*, No. 05-cv-1269  
 20 C.D.Cal. are not Plaintiffs in this case. See Amended Complaint and Appendices. In addition,  
 21 there is no final order in that case as yet. The 64 Plaintiffs whose claims were dismissed without  
 22 prejudice by Judge Carter would have had to start a separate case even if they had filed in that  
 23 District.<sup>2</sup>

---

25 <sup>2</sup> Defendant Fed. Ex Corp sought dismissal in *Clausnitzer, et al.* Although Judge  
 26 Carter entered an order granting summary judgment to Defendant FedEx on the  
 27 claims of the five plaintiffs in that case, those Plaintiffs, represented by this Firm,  
 filed a motion to alter or amend that order, which is still pending before Judge

1        This case is unlike the ruling in *Forrand, et al v. Federal Express Corporation*, No. 07-  
 2 4674, Ex. D. relied upon by the Defendant at pages 8-9. In that case was brought by four  
 3 employees seeking relief for violations two provisions of California wage and hour law. Ex. D  
 4 pages 1-2. No claims were filed under ERISA or the ADEA.

5        In that case three of the four plaintiffs had filed an earlier suit in the Central District but  
 6 had missed the date set in the scheduling order for filing a motion for class certification under  
 7 Rule 23. When the District Court denied their motion to amend the scheduling order, they moved  
 8 for a voluntary dismissal of their case in the Central District without prejudice, which was  
 9 granted. They filed an amended complaint joining them with *Forrand* in the case in this district.

10      The District Court gave "less weight" to the choice of forum of the four plaintiffs in that  
 11 case because "the operative facts did not occur in this district" citing and relying upon *Lou v.*  
 12 *Belzberg*, 834 F.2d 530, 703 (9<sup>th</sup> Cir. 1987). In fact, the operative facts had occurred for the four  
 13 Plaintiffs in the Central District and the Eastern District, but not in this District.

14      There is no good reason to bar the 64 Plaintiffs who attempted to join the *Clausnitzer*,  
 15 *supra*, from participation as full Plaintiffs in this case. The ADEA, 29 U.S.C. 626(b), authorizes  
 16 participation for similarly situated persons as a plaintiff by signing a statement joining the suit.  
 17 *Hoffman La Roche v. Spaulding*, 493 U. S. 165, (1989). In addition to the fact that the ADEA  
 18 fosters collective proceedings which are not subject to class actions under Rule 23, that case is  
 19 different than *Forrand* because the operative facts with respect to at least five of the plaintiffs  
 20 here, including Hulac, occurred in this District. and because they have direct claims for violations  
 21 of the ADEA and ERISA that harmed them here. And each of the other plaintiffs claims present  
 22 issues of fact and law about the allegations of age and pension discrimination in violation of  
 23 federal law. The fact that they attempted to "opt-in" to the *Clausnitzer* case under the ADEA  
 24 collective action provisions does not prevent their participation as parties in this action. It is  
 25 irrelevant to the venue question.

---

26  
 27      Carter in that case. *Clausnitzer*, See Docket #219  
 28

Defendant's statement that it is not "a resident of California"...is factually incorrect, at least for venue purposes. See 28 U.S.C. 1391(c) . Memo. of Defendant Federal Express Corp. at page 3. That statement of Defendant is contrary to the words of the general provision of Title 28, which states that "For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside any jurisdiction to which it is subject to personal jurisdiction." 29 U.S.C. 1391(c).

[V]enue is proper in a judicial district if a ‘substantial part of the events or omissions giving rise to the claim occurred’ in that district.” *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1075 (9<sup>th</sup> Cir. 2001); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 842 (9<sup>th</sup> Cir. 1986); *Tribal Fusion, Inc. v. Click Here, Inc.*, 2005 WL 2008022 (N.D. Cal. 2005). In employment discrimination cases, “venue is appropriate in the judicial district in which the plaintiff worked or would have worked.” *Passaantino v. Johnson & Johnson*, 212 F.3d 493, 504 (9<sup>th</sup> Cir. 2000), *Tamashiro v. Harvey*, 487 F.Supp.2d 1162, 1166 (D. Hawaii 2006).

## **CONCLUSION**

For the reasons stated above and because venue is proper in this District the Defendant's motion to transfer should be denied.

By: /s/ David L. Rose  
David L. Rose  
Joshua N. Rose  
Earlene W. Rosenberg  
Attorneys for Plaintiffs

DATED: June 11, 2008

ROSE & ROSE, P.C.

1 Joshua N. Rose (DCB 420606) *Pro Hac Vice Application Pending*  
Josh@Roselawyers.com

2 David L. Rose (DCB 376379)  
Daver@Roselawyers.com

3 Earlene W. Rosenberg (DCB 974273) *Pro Hac Vice Application Pending*  
Erosenberg@roselawyers.com

4 **ROSE & ROSE, P.C.**  
1320 19<sup>th</sup> Street, N.W., Suite 601  
5 Washington, D.C. 20036  
Telephone: (202) 331-8555  
6 Facsimile: (202) 331-0996

7 Attorneys for Plaintiffs

8 Allen C. Speares (CA Bar 112108)  
Aspeare@att.net

9 **Law Office of Allen C. Speare**  
111 N. Market Street, Suite 970  
0 San Jose, CA 95113  
Telephone: (408) 795-1180  
1 Facsimile: (408) 795-1184

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

15 FRED HULAC, KATHY FINGARSON )  
16 DAVID WILLIAMS RAUL ) CASE NO. 08-01557 (JSW)  
17 ARMENDARIZ, GLENORA SPINKS, )  
WILLIAM STEWART and all )  
those similarly situated )  
18 Plaintiffs, )  
19 vs. ) PLAINTIFFS [PROPOSED] ORDER  
20 FEDERAL EXPRESS CORPORATION ) IN SUPPORT OF PLAINTIFFS'  
21 ) MEMORANDUM IN OPPOSITION  
22 Defendant. ) TO TRANSFER VENUE

## **ORDER**

25 I, The Honorable Jeffrey S. White, HEREBY DENY Defendant's Motion to Transfer this suit to  
26 the Central District of California.

27

28

Date

Honorable Jeffrey S. White

**Certificate of Service**

3 I Earlene W. Rosenberg, hereby certify that Plaintiffs'  
4 Memorandum in Opposition Defendant's Motion to Transfer Venue and  
5 Proposed Order were served electronically on June 11, 2008.

/s/Earlene W. Rosenberg

Earlene W. Rosenberg